Tan Lay Ean v Kenneth Yoong Ken Chinson St James & Anor

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02(A)-1522–09 OF 2023
MARIANA YAHYA, CHOO KAH SING AND FAIZAH JAMALUDIN JJCA
3 APRIL 2025

Legal Profession — Professional discipline — Misconduct — Complaints on conduct of opponent litigant as frivolous and vexatious litigant through letter written to presiding judge — Whether act amounted to misconduct — Whether would amount to obstructing court in administering fair justice to litigants — Whether appellant accorded right to be heard by disciplinary board

Statutory Interpretation — Definition — 'that is likely to be adverse against an advocate and solicitor' — Whether same words used in pre and post s 103D(4) of Legal Profession Act 1976 — Whether connoted same interpretation — Whether right to be heard ought to be accorded before disciplinary board meted out decision for adverse punishment to be imposed on advocate and solicitor

This was an appeal against the decision of the High Court wherein the High Court judge ('HCJ') dismissed the appellant's originating summons which was filed pursuant to s 103E of the Legal Profession Act 1976 ('the LPA'). The appellant's complaint was against the decision of the disciplinary board ('DB') based on the outcome of an investigation carried out by the disciplinary committee ('DC') over seven complaints filed by the first respondent against the appellant. The DB, after having considered the DC's recommendations, made an order against the appellant in respect of the seventh complaint only. Essentially, the seventh complaint was based on a letter ('impugned letter') written by the first respondent to the DB complaining that the appellant had breached ss 94(3)(d), (k) and (o) of the LPA and rr 18 and 31 of the Legal Profession (Practice and Etiquette) Rules 1978 ('the LPR'). The complaint to the DB was that the appellant had written the impugned letter addressed directly to the HCJ complaining against the first respondent's conduct and alleging that there was 'vexatious and frivolous use of the appeal procedure' by the first respondent and that the appellant and made libelous remarks against the first respondent as an opponent litigant. The appellant was aggrieved by the decision of the DB, and thereby appealed to the High Court pursuant to s 103E of the LPA. The HCJ, inter alia, found that the action taken by the appellant vis a vis writing the impugned letter was a wrong mode to urge the HCJ to invoke para 17 of the Schedule (Additional Powers of the High Court) of the Courts of Judicature Act 1964 to declare that the first respondent as a

vexatious litigant. With regard to the question raised by the appellant as to whether the DB was under a duty to give the appellant an opportunity to be heard before making its decision to accept or reject the DC's recommendation, the HCJ held that there was no requirement for the DB to give the appellant the right to be heard because the decision of the DB could not be said to be adverse against the appellant. Hence, the present appeal. The issues that arose for determination were: (a) whether it was a misconduct to describe an opponent litigant, who was also by profession an advocate and solicitor, as a frivolous and vexatious litigant; (b) whether the DB should accord the appellant a right to be heard before the DB made its decision.

Held, dismissing the appeal:

(1) There was no basis to interfere with the fact finding of the DC in that the act of writing to a presiding judge complaining of the conduct of the first respondent amounted to a misconduct under the law. Fact finding ought to be determined by the DC. The conduct of the appellant describing the litigant (the first respondent) as frivolous and vexatious was in fact 'unbefitting of an advocate and solicitor or which brings or was calculated to bring the legal profession into disrepute'. An advocate and solicitor, although required to act fearlessly to uphold the interest of his/her client, must first place the interest of justice and dignity of the profession above all else, even it could lead to an unpleasant consequence either to himself/herself or to any person, including to his or her client (r 16 of the LPR) (see paras 19 & 21–22).

(2) The appellant knew the first respondent was not just a litigant in the ongoing judicial separation proceeding but was also an active practising advocate and solicitor. The appellant had insinuated that the first respondent did not just behave as a very difficult litigant, but had also leveraged on his profession as an advocate and solicitor in the judicial separation proceeding. The appellant's action of making a written complaint directly to the presiding judge of an ongoing litigation about the opponent litigant ought to be frowned upon (see paras 23–25).

(3) The first respondent as an opponent litigant in the court case was represented by a firm of solicitors, if there was any complaint against any actions taken in the court case, the complaint ought to be made to the firm of solicitors representing him, as opposed to making a complaint directly to the presiding judge. If such practice was allowed, the ramification was that the court would be bombarded with complaint letters by lawyers complaining against their opponent litigants. Further, the complaints made against the opponent litigant would prejudice and influence the mind of the presiding judge. This could in a way amount to 'obstructing' the court in administering fair justice to the litigants as well as breed an unhealthy practice in the legal profession (see para 26).

(4) There was no justification for the appellant to 'suggest' to the presiding judge to consider taking necessary action vis a vis to declare the first respondent as a vexatious litigant so as to not to burden the presiding judge with further unnecessary vexatious applications. By doing so, the appellant had crossed the lines of professional conduct as an advocate and solicitor regardless of whether the complaint was against the first respondent as a litigant or in his capacity as an advocate and solicitor (see para 28).

(5) Although the wordings of the pre-amendment provision and the present provision of s 103D of the LPA were slightly different, the fact that the same words 'that is likely to be adverse against an advocate and solicitor' were used in both pre and post s 103D(4) of the LPA would connote the same interpretation. Therefore, a right to be heard ought to be accorded to the appellant before the DB meted out its decision for an adverse punishment to be imposed on the advocate and solicitor (see para 36).

(6) The DB had decided for the appellant to be censured and had rejected the DC's recommendation of a fine of RM30,000. The punishment of censure was a lesser punishment, not just lesser punishment but the least or the lowest punishment possible. Next to the lowest punishment would be no punishment, to wit, exoneration from liability. Therefore, it would make a mockery of the procedure under s 103D(4) of the LPA (pre or post amendment) if a hearing must be held for mitigation on the intended lowest punishment (see para 39).

(7) The effect of the DB's decision was a favourable one to the appellant when viewed in the context of the DC's recommendation. Therefore, whether the right to be heard was given or not, it would not make a difference because the DB's decision was favourable to the appellant, and the punishment was the lowest punishment that the appellant could have asked for. It could not be said the breach of natural justice. A mere breach of right to be heard was in itself insufficient for the court to set aside the entire decision of the DB or overturn the High Court's decision when the breach was of no significance or was not serious such as to have impact on the outcome of the DB's final decision (see para 40).

[Bahasa Malaysia summary

Ini adalah rayuan terhadap keputusan Mahkamah Tinggi yang mana hakim Mahkamah Tinggi ('HMT') menolak saman pemula perayu yang difailkan dibawah s 103E Akta Profesion Undang-Undang 1976 ('APUU'). Tindakan perayu adalah untuk mencabar keputusan Lembaga Tatatertib ('LT') berdasarkan hasil siasatan yang dijalankan oleh Jawatankuasa Tatatertib ('JT') di atas tujuh aduan yang difailkan oleh responden pertama terhadap perayu. LT, selepas mempertimbangkan cadangan JT, membuat perintah terhadap perayu berkenaan dengan aduan ketujuh. Pada asasnya, aduan ketujuh adalah

berdasarkan surat ('surat yang dipertikaikan') yang ditulis oleh responden pertama kepada DB yang mengadu bahawa perayu telah melanggar ss 94(3)(d), (k) dan (o) APUU dan kk 18 dan 31 Kaedah-Kaedah Profesion Undang-Undang (Amalan dan Etika) 1978 ('KKPUU'). Aduan kepada LT adalah bahawa perayu telah menulis surat yang dipertikaikan yang ditujukan terus kepada HMT mengadu terhadap tingkah laku responden pertama dan mendakwa bahawa terdapat 'penggunaan prosedur rayuan yang remeh dan menyusahkan' oleh responden pertama dan perayu dan membuat kenyataan fitnah terhadap responden pertama sebagai pihak litigasi lawan. Perayu yang terkilan dengan keputusan LT tersebut merayu ke Mahkamah Tinggi menurut s 103E APUU. HMT, antara lain, mendapati bahawa tindakan yang diambil oleh perayu terhadap penulisan surat yang dipertikaikan adalah cara yang salah untuk menggesa HMT menggunakan perenggan 17 Jadual (Kuasa Tambahan Mahkamah Tinggi) Akta Mahkamah Kehakiman 1964 untuk mengisytiharkan bahawa responden pertama sebagai litigan yang meremehkan. Berkenaan dengan persoalan yang dibangkitkan oleh perayu sama ada LT mempunyai kewajipan untuk memberi peluang kepada perayu untuk didengar sebelum membuat keputusannya untuk menerima atau menolak cadangan JT, HMT memutuskan bahawa tidak ada keperluan bagi LT untuk memberi perayu hak untuk didengar kerana keputusan LT tidak boleh dikatakan merugikan perayu. Oleh itu, rayuan ini difailkan. Isu-isu yang timbul untuk penentuan adalah: (a) sama ada terdapat salah laku yang menunjukkan pihak litigasi lawan yang juga merupakan seorang peguam bela dan peguamcara sebagai litigan yang remeh dan menyusahkan; (b) sama ada LT harus memberikan perayu hak untuk didengar sebelum LT membuat keputusannya.

Diputuskan, menolak rayuan:

(1) Tiada asas untuk mengganggu penemuan fakta LT kerana tindakan menulis surat kepada hakim yang mendengar kes tersebut mengenai kelakuan responden pertama merupakan salah laku di bawah undang-undang. Pencarian fakta harus ditentukan oleh LT. Tingkah laku perayu yang menggambarkan pihak litigan (responden pertama) sebagai remeh dan menjengkelkan sebenarnya 'tidak sesuai dengan peguam bela dan peguam cara atau yang membawa atau dikira untuk membawa profesion undang-undang ke dalam reputasi buruk'. Seorang peguambela dan peguamcara, walaupun dikehendaki untuk bertindak tanpa takut untuk menegakkan kepentingan anak guamnya, haruslah terlebih dahulu meletakkan kepentingan keadilan dan maruah profesion di atas segala-galanya, walaupun ianya boleh membawa kepada akibat yang tidak menyenangkan sama ada kepada dirinya sendiri atau kepada mana-mana orang termasuk kepada anak guamnya (k 16 APUU) (lihat perenggan 19 & 21–22).

(2) Perayu mengetahui bahawa responden pertama bukan sahaja seorang

litigan dalam prosiding kehakiman yang berasingan yang masih belum selesai tetapi juga merupakan seorang peguam bela dan peguam cara yang masih aktif beramal. Perayu secara kiasan menyatakan bahawa responden pertama bukan sahaja berkelakuan sebagai litigan yang sangat sukar, tetapi juga telah menggunakan manfaat profesionnya sebagai peguam bela dan peguam cara dalam prosiding kehakiman yang berasingan. Tindakan perayu yang membuat aduan bertulis terus kepada hakim yang mendengar kes yang sedang berlangsung mengenai pihak lawan yang litigan harus dipandang serius (lihat perenggan 23–25).

(3) Responden pertama adalah pihak litigasi lawan dalam kes mahkamah diwakili oleh firma peguamcara. Sekiranya terdapat sebarang aduan terhadap sebarang tindakan dalam kes mahkamah, aduan tersebut harus dibuat kepada firma peguam cara yang mewakilinya, berbanding membuat aduan terus kepada hakim yang mendengar kes. Sekiranya amalan sedemikian dibenarkan, akibatnya adalah mahkamah akan terus mendapat surat aduan oleh peguam terhadap pihak litigasi lawan mereka. Selanjutnya, aduan yang dibuat terhadap pihak litigasi akan menjejaskan dan mempengaruhi fikiran hakim yang mendengar kes. Hal ini boleh 'menghalang' mahkamah untuk memutuskan kes dengan adil kepada pihak litigan serta menggalakkan amalan yang tidak sihat dalam profesion undang-undang (lihat perenggan 26).

(4) Tiada justifikasi bagi perayu yang 'mencadangkan' kepada hakim yang mendengar kes untuk mempertimbangkan mengambil tindakan dengan mengisytiharkan responden pertama sebagai litigan yang meremehkan supaya tidak membebankan hakim yang mendengar kes tersebut dengan permohonan meremehkan yang tidak perlu. Dengan berbuat demikian, perayu telah tidak bersifat profesional sebagai peguam bela dan peguam cara tanpa mengira sama ada aduan itu terhadap responden pertama sebagai litigan atau dalam kapasitinya sebagai peguam bela dan peguam cara (lihat perenggan 28).

(5) Walaupun peruntukan sebelum pindaan dan peruntukan terkini s 103D APUU sedikit berbeza, fakta bahawa perkataan yang sama 'yang mungkin merugikan peguam bela dan peguamcara' yang digunakan dalam kedua-dua pra dan pasca s 103D(4) APUU mempunyai tafsiran yang sama. Oleh itu, hak untuk didengar harus diberikan kepada perayu sebelum LT membuat keputusan untuk hukuman dikenakan ke atas peguam bela dan peguam cara tersebut (lihat perenggan 36).

(6) LT telah memutuskan agar perayu disenarai hitam dan telah menolak cadangan JT untuk memberikan hukuman denda sebanyak RM30,000. Hukuman senarai hitam adalah hukuman yang lebih rendah. Bukan sahaja ianya merupakan hukuman yang lebih rendah tetapi hukuman yang paling sedikit atau serendah mungkin. Namun, selain dari hukuman tersebut, tiada hukuman lain yang boleh dikenakan

melalainkan membebaskannya daripada liabiliti. Oleh itu, ianya menyalahi prosedur di bawah s 103D(4) APUU (sebelum atau selepas pindaan) sekiranya perbicaraan diadakan untuk mengurangkan hukuman terendah yang dimaksudkan (lihat perenggan 39).

(7) Kesan keputusan LT adalah baik kepada perayu apabila dilihat dalam konteks cadangan JT. Oleh itu, sama ada hak untuk didengar diberikan atau tidak, ianya tidak akan membuat perbezaan kerana keputusan LT memihak kepada perayu dan hukuman itu adalah hukuman terendah yang boleh dikenakan terhadap perayu. Ianya tidak boleh dikatakan sebagai pelanggaran keadilan semula jadi. Pelanggaran hak untuk didengar semata-mata tidak mencukupi bagi mahkamah untuk mengenepikan keseluruhan keputusan LT atau membatalkan keputusan Mahkamah Tinggi apabila pelanggaran itu tidak penting atau tidak serius sehingga memberi kesan kepada keputusan keputusan akhir LT (lihat perenggan 40).]

Cases referred to

Dato' Kanagalingam a/l Veluppillai v Majlis Peguam Malaysia [2022] 3 MLJ 699, CA (refd)
Majlis Peguam Malaysia v Syed Ahmad Imdadz bin Said Abad & Anor [2024] 1 MLJ 527; [2024] 1 CLJ 353, FC (refd)
Master Mulia Sdn Bhd v Sigur Rus Sdn Bhd [2020] 12 MLJ 198; [2020] 9 CLJ 213, FC (refd)

Legislation referred to

Courts of Judicature Act 1964 Schedule, para 17
Legal Profession (Practice and Etiquette) Rules 1978 rr 16, 18, 31
Legal Profession Act 1976 ss 94(3)(d), (3)(k), (3)(o), 103D, 103D(4), 103E

Appeal from: *Tan Lay Ean v Kenneth Yoong Ken Chinson St James (Majlis Peguam, intervener)* [2023] MLJU 2812 (High Court, Kuala Lumpur)

K Shanmuga (with Natalie Jong Ling Li) (Kanesalingam & Co) for the appellant.
Jonathan Gerard (with Jessica Chew) (Louis Ambrose & Partners) for the first respondent.
Arthur Wang Ming Way (with Nurufarhina bt Ab Rahim) (Arthur Wang, Lian & Assoc) for the second respondent.

Choo Kah Sing JCA:

INTRODUCTION

[1] This is an appeal against the High Court decision dated 29 August 2023 wherein the learned High Court judge had dismissed the appellant's

originating summons which was filed pursuant to s 103E of the Legal Profession Act 1976 ('the LPA'). The appellant sought for the following orders as reproduced below:

A. bahawa bahagian keputusan Lembaga bertarikh 19.11.2021 untuk mengenakan celaan (censur) terhadap Plaintif ('Keputusan Tersebut') berasaskan. Aduan Ke-7 yang dikandungi dalam Aduan No DB/14/9476 vide surat Responden bertarikh 30.5.2014 ('Aduan Ke-7') diketepikan;

B. aduan Ke-7 ditolak;

C. peruntukan sewajarnya dibuat untuk kos rayuan ini; dan

D. apa-apa relif lain yang difikirkan perlu atau wajar oleh Mahkamah yang Mulia ini.

[2] On 20 January 2025, this court, after having considered the oral and written submissions of the counsels for the respective parties, dismissed the appellant's appeal and affirmed the High Court order dated 29 August 2023. The reasons for the decision are set out as below.

SALIENT FACTS

[3] The appellant's complaint centers on the decision of the disciplinary board ('the DB') dated 19 November 2021. The decision of the DB was the outcome of an investigation carried out by the disciplinary committee ('the DC') over seven complaints which were filed by the first respondent complaining against the appellant and one Chew Swee Yoke for breach of the LPA and its Rules. The DB, after having considered the DC's recommendations, made an order against the appellant in respect of the seventh complaint as follows:

> (iii) In respect of the 7th complaint against the 1st respondent, the Disciplinary Board affirmed the Disciplinary Committee's finding of liability but rejected the recommendation on punishment for fine, instead IT IS HEREBY ORDERED that the 1st Respondent be censured; and

[4] With regards to the other six complaints, no liability was found against the appellant and Chew Swee Yoke. The appellant was aggrieved by the decision of the DB, and thereby appealed to the High Court pursuant to s 103E of the LPA.

[5] Essentially, the seventh complaint is based on a letter dated 30 May 2014 which was written by the first respondent to the DB complaining that the appellant had breached s 94(3)(d), (k) and (o) of the LPA and rr 18 and 31 of the Legal Profession (Practice and Etiquette) Rules 1978 ('the LPR').

[6] The complaint to the DB was that the appellant had on 16 December 2013 written a letter ('the impugned letter') addressed directly to the High Court judge complaining against the first respondent's conduct, and alleging that there was 'vexatious and frivolous use of the appeal procedure' by the first respondent and that the appellant and made libelous remarks against the first respondent as an opponent litigant.

AT THE HIGH COURT

[7] The learned High Court judge (as he then was) found that the action taken by the appellant vis a vis writing the impugned letter addressed directly to the High Court judge (Justice Noraini bt Abdul Rahman) who was the presiding judge on an ongoing judicial separation proceeding involving the first respondent himself and one Michele Kythe Lim Beng Sze, was a wrong mode to urge the High Court judge to invoke para 17 of the Schedule (Additional Powers of the High Court) of the Courts of Judicature Act 1964 to declare that the first respondent as a vexatious litigant.

[8] The learned High Court judge was of the opinion that there was no necessity for the DB to formulate a proper charge against the appellant after having examined the contents of the correspondences exchanged between the appellant and the DB which were sufficient for the appellant to know what the complaint against her was. The learned High Court judge also found that the members of the DC did not descend into the arena during the proceedings.

[9] With regard to the question raised by the appellant as to whether the DB was under a duty to give the appellant an opportunity to be heard before making its decision to accept or reject the DC's recommendation, the learned High Court judge was of the opinion that in the circumstances of the case, there was no requirement for the DB to give the appellant the right to be heard because the decision of the DB could not be said to be adverse against the appellant. The learned High Court judge stated that 'the substitution of a lesser punishment could not, by any stretch of legal imagination, be construed as is 'likely to be adverse against' the appellant for her to be accorded a reasonable opportunity to be heard'.

[10] Based on the above findings, and among others, the learned High Court judge dismissed the appellant's originating summons.

THE FINDINGS OF THIS COURT

[11] Before this court, the appellant had confined her appeal to only two issues. First, was it a misconduct to describe an opponent litigant, who was also by profession an advocate and solicitor, as a frivolous and vexatious litigant?

Secondly, whether the DB should accord the appellant a right to be heard before the DB made its decision. This court will address the two issues in seriatim.

The first issue — Misconduct

[12] The first respondent's seventh complaint against the appellant was essentially captured in his letter (dated 30 May 2014), particularly in the following paras as reproduced below:

> 13. On 16.12.2013, Tan issued a letter under the letterhead of Tan Law Practice to the High Court alleging inter alia that my Notice of Appeal to Judge in Chambers is a vexatious and frivolous use of the appeal procedure; that I was behaving like a vexatious litigant in instructing my solicitors to reply to their letter dated 7.12.2013 to the Learned Judge; and to further ask the learned judge to take cognizance of my unbecoming behaviour which was allegedly becoming intolerable.
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> 14. This letter dated 16.12.2013 was copied to various persons listed after the contents namely the Petitioner, Chew and my firm Michael Chai & Co (now known as Michael Chai Ken). A copy of this letter dated 16.12.2013 from Tan is attached herewith as Annexure 'KSJ-1'. Please refer to pages 3 and 4, in particular the highlighted portions.
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> 15. Tan is resorting to libelling me in Tan's letters to the High Court. Tan knows that I am a practicing Advocate and Solicitor of 22 years standing and that I frequently appear in all levels of the courts, and that there is likelihood that i will appear before the Learned Judge for family law related cases. Further, I am a party in the Matter! The Learned Judge concerned is hearing and deciding on proceedings in the Matter. Despite knowing this, Tan deliberately wrote to the Learned Judge, making unnecessary, unjustified and defamatory statements about me.
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> 16. Tan has failed to keep her opinion of me to herself but has instead cast terrible aspersions into the merits of the ongoing proceedings before the High Court that is presided over by the Learned Judge. I submit that this is an act laden with malice and it has caused damage to my good name and reputation as an advocate and solicitor.
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> 17. Tan has ignored the usual dictates of legal decency and propriety.
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> 18. I further submit that this conduct of Tan's caused a grave impropriety; it tantamounted to conduct which was unbefitting of an Advocate and Solicitor. It was conduct that was not characterized by candour, courtesy and fairness. It was conduct which compromised the dignity and high standing of our profession. And it was conduct which brings our profession into disrepute.

[13] The appellant's letter dated 16 December 2013 to the High Court judge is reproduced as below (the English version):

> ENGLISH VERSION
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> 1. We refer to the Respondent's Notice of Appeal dated 3 December 2013 fixed for mention on 17 December 2013. Because of the purported grounds of the appeal

from the Deputy Registrar's case management directions, we are compelled to lodge our protest at the vexatious and frivolous use of the appeal procedure based on the following reasons:

1.1. to the best of our knowledge, there is no procedure under the rules for an appeal to the learned judge based on an administrative decision on filing dates made by the registrar in Case Management;

1.2. if the Respondent is dissatisfied with the way the case management was conducted, the proper procedure is for his solicitors to write to the learned judge for an appointment for both solicitors to attend before the learned judge. After the said discussion, the learned judge can make the necessary adjustments in directions, if deemed appropriate;

1.3. If the Court rules in our favour in Enclosure 107, the Respondent will have to file afresh and thereafter, the Petitioner and Respondent shall file affidavits in the sequence laid down by the rules and participate in an investigation of the issues of means, etc;

1.3. our Written Submission for Enclosure 107 was filed as far back as 13 November 2013. In it, we had informed the Court that we would not file a Reply Affidavit until we knew the outcome of Enclosure 99. This was because if Enclosure 99 succeeds, Enclosure 107 cannot proceed:

1.4. furthermore, at the end of the hearing on 20 November 2013, our Senior Counsel Ms Chew indicated that we would need to file the Petitioner's Reply Affidavit if the decision on the objections regarding the procedure and format of Enclosure 107 went against the Petitioner. We recall the learned judge stating that this could be dealt with during case management; and

1.5. in the above circumstances, the Deputy Registrar's direction on the filing of further affidavits before the continued hearing of Enclosure 107 is reasonable and sensible.

2. We refer to the letter dated 13 December 2013 from Michael Chai & Co (MC) which is annexed and marked as 'B' objecting to our letter dated 7 December 2013 which is annexed and marked as 'A'. Our responses to that are as follows:

2.1. although learned Judge has ruled that she will hear all 4 applications together, she in fact dealt with the committal proceedings in Enclosures 68 and 90 first. Then when the Petitioner decided to shorten the committal proceedings by electing to comply but submitting on costs, the Leamed Judge reserved her decision on Enclosures 68 and 90 and decided to proceed with Enclosure 99 before Enclosure 107. We believe the reason was obvious;

2.2. MC's statements in Paragraphs 3.2 and 3.3 indicate that the Respondent still does not realize the significance if Enclosure 99 succeeds. Basically, if Enclosure 99 succeeds, it means various benefits have been set aside and are no longer payable by the Petitioner to the Respondent. Even the so-called variations in Enclosure 107 will no longer be feasible;

2.3. as regards Paragraph 3.4, we presume that the letter was not dictated by the Respondent's counsel Mr. G.K. Ganesan and must have been written by the Respondent himself. The writer must have been napping in court when Ms Chew read the 'Petitioner's Submission on Costs in the 2 Contempt Proceedings' as the

English case cited is *Evans v Evans* [1990] 1 FLR 319 per Justice Booth and we referred to the case report summary and commentary in [1990] Fam Law Pgs 215–216. It is very offensive of the writer to insinuate that Ms Chew would misrepresent what she read in court. We ask the learned judge to take cognizance of the Respondent's unbecoming behaviour which is becoming intolerable.

3. In order not to burden Her Ladyship with any further unnecessary vexatious applications, we urge Her Ladyship to consider the necessary action under the Schedule: Additional Powers of the High Court, Courts of Judicature Act 1964, Paragraph 17 of the Additional Powers of the High Court to restrain the Respondent as he is behaving like a vexatious litigant. The problem is compounded by the fact that he is represented by his own legal firm and need not pay legal fees, and he is becoming very personal in his 'war' against the Petitioner, her solicitors and the counsel.

[14] The DC, after having heard the parties, made the following findings:

Issue No: 7. Writing to Court with libelous statement against the Complainant.

The Complainant filed an Appeal to the Judge In Chambers against a decision of the Registrar. The Respondent issued a letter to the Court. (Refer Record of Complaint dated 16.12.2013). 'We ask the learned judge to take cognizance of [Complainant] unbecoming behavior which is becoming intolerable... We urge her Ladyship to consider the necessary action to restrain [KSJ] as [KSJ] is behaving like a vexatious litigant. The problem is compounded by the fact that [KSJ] is represented by his own legal firm and need not pay legal fees, and he is becoming very personal in his 'war' against the petitioner, her solicitors and the counsel'.

This committee views the above as a serious misconduct. The Respondents made defamatory remarks against a lawyer in writing to a judge who is hearing and deciding the case. This conduct is unacceptable. We considered both the Respondents response and submission but found that their conduct was unbefitting of an advocate and solicitor which clearly brings the legal profession into disrepute. They had clearly breach Section 94(3)(o) LPA and Section 94(3)(d) LPA — breach rules of practice and etiquette made by Bar Council (i) Rule 18 — to conduct herself with candour, courtesy and fairness. (ii) Rule 31 — to uphold the dignity of the profession.

The Complainant had proven his case beyond reasonable doubt against both the Respondent and they are clearly found guilty on issue No. 2, 6 and 7. This decision is unanimous. Both Respondent had colluded with each other.

We had made our decision after careful consideration and after scrutinizing all documents and also listening to both the Respondents and taking into account the demeanour of the witness, we made a finding of fact that both Respondents had committed misconduct.

[15] On 18 September 2019, the DC, after hearing the parties, found there was sufficient merit in the complaint and recommended that the appellant (and Chew Swee Yoke) both should be subjected to an imposition of a fine of RM30,000 each. As mentioned earlier, the DB rejected the finding of liability

by the DC against Chew Swee Yoke, but affirmed the finding of liability against the appellant in respect of the seventh complaint. The DB decided to censure the appellant, instead of imposing a fine.

[16] The appellant's counsel submitted that the DC found the appellant was in breach of s 94(3)(o) and (d) of the LPA, and rr 18 and 31 of the LPR. The appellant's counsel submitted that DC was wrong to find the impugned letter was a letter against the first respondent in his capacity as an advocate and solicitor. The impugned letter referred to the first respondent as a litigant in an ongoing judicial separation proceeding, the appellant's counsel submitted. Therefore, the DC got it wrong to find the appellant had misconducted herself as an advocate and solicitor against another advocate and solicitor, the appellant's counsel further submitted. The appellant counsel also submitted that rr 18 and 31 do not apply to a litigant.

[17] Section 94(3)(d) and (o) of the LPA states as follows:

> (3) For the purposes of this Part, 'misconduct' means conduct or omission to act in Malaysia or elsewhere by an advocate and solicitor in a professional capacity or otherwise which amounts to grave impropriety and includes —
>
> ...;
>
> (d) breach of any rule of practice and etiquette of the profession made by the bar Council under this Act or otherwise;
>
> ...;
>
> (o) being guilty of any conduct which is unbefitting of an advocate and solicitor or which brings or is calculated to bring the legal profession into disrepute.

[18] Rules 18 and 31 of the LPR read as follows:

> 18 *Advocate and Solicitor to conduct with candour, courtesy and fairness*
>
> The conduct of an advocate and solicitor before the Court and in relation to other advocates and solicitors shall be characterized by candour, courtesy and fairness.
>
> 31 *Advocate and solicitor to uphold dignity of profession*
>
> Every advocate and solicitor shall at all times uphold the dignity and high standing of his profession.

[19] This court is of the view that there is no basis for this court to interfere with the fact finding of the DC in that the act of writing to a presiding judge complaining of the conduct of the first respondent amounted to a misconduct under the law. Fact finding ought to be determined by the DC. The DC was of the opinion that the appellant had made defamatory remarks against the first respondent as an advocate and solicitor to the presiding judge, that such conduct was unacceptable. The DC also found that such conduct was

unbefitting of an advocate and solicitor and had brought the legal profession into disrepute. In conclusion, the DC remarked that 'after scrutinising all documents and also listening to both the respondents and taking into account the demeanor of the witness, we made a finding of fact that both respondents had committed misconduct'.

[20] However, this court will address the legal issue raised by the appellant as to whether an advocate and solicitor's action of describing an opponent litigant, who was also an advocate and solicitor, as frivolous and vexatious could amount to an act of misconduct.

[21] This court is of the considered view that in the circumstances of the peculiar facts of the case, the conduct of the appellant describing the litigant (the first respondent) as frivolous and vexatious was in fact 'unbefitting of an advocate and solicitor or which brings or is calculated to bring the legal profession into disrepute' and in breach of the specified rules for the reasons below.

[22] An advocate and solicitor, although required to act fearlessly to uphold the interest of his/her client, must first place the interest of justice and dignity of the profession above all else, even it could lead to an unpleasant consequence either to himself/herself or to any person, including to his or her client. This proposition is stated in r 16 of the LPR.

[23] In the present case, the appellant had urged the presiding judge to take drastic measure against the first respondent and had accused the first respondent of 'behaving like a vexatious litigant'. The appellant knew the first respondent was not just a litigant in the ongoing judicial separation proceeding but was also an active practising advocate and solicitor.

[24] The appellant further stated that 'the problem is compounded by the fact that he is represented by his own legal firm and need not pay legal fees, and he is becoming very personal in his 'war" against the appellant, her solicitors and the counsel. In a way, the appellant had insinuated that the first respondent did not just behave as a very difficult litigant, but had also leveraged on his profession as an advocate and solicitor in the judicial separation proceeding. Therefore, the impugned letter had by extension complained against the first respondent not only in his capacity as a litigant, but also the fact that the first respondent was an advocate and solicitor.

[25] This court is of the considered view that even if the first respondent was not an advocate and solicitor, the appellant's action of making a written complaint directly to the presiding judge of an ongoing litigation about the opponent litigant ought to be frowned upon.

[26] The first respondent as an opponent litigant in the court case was represented by a firm of solicitors, if there is any complaint against any actions taken in the court case, the complaint ought to be made to the firm of solicitors representing him, as opposed to making a complaint directly to the presiding judge. If such practice is allowed, the ramification is that the court will be bombarded with complaint letters by lawyers complaining against their opponent litigants. Further, the complaints made against the opponent litigant would prejudice and influence the mind of the presiding judge. This could in a way amount to 'obstructing' the court in administering fair justice to the litigants as well as breed an unhealthy practice in the legal profession.

[27] In the present case, if the appellant in her professional view opined that the first respondent's behavior was unreasonable, ie, by filing multiple appeals, the appellant could have always advised her client to file an application in court to seek a declaration that the first respondent was a vexatious litigant.

[28] There was no justification for the appellant to 'suggest' to the presiding judge to consider taking necessary action vis a vis to declare the first respondent as a vexatious litigant so as to not to burden the presiding judge with further unnecessary vexatious applications. Whatever the reasons that motivated the appellant to do so, the appellant had crossed the lines of professional conduct as an advocate and solicitor regardless whether the complaint was against the first respondent as a litigant or in his capacity as an advocate and solicitor.

Second issue — Right to be heard before DB made its decision

[29] This issue was not raised in the memorandum of appeal in the manner it was raised in the appellant's submission. However, this court will address the issue in accordance with the manner raised in the appellant's submission because it is a question of law in relation to the interpretation of s 103D of the LPA.

[30] Although the DB made its decision on 19 November 2021, but the seventh complaint was lodged on 30 May 2014, therefore the parties agreed that the governing provision that should apply in the present case was the pre-amendment provision of s 103D of the LPA. The pre-amendment provision of s 103D of the LPA reads as follows:

> (2) The Disciplinary Board may in appropriate cases impose a greater punishment than that recommended by the Disciplinary Committee.
>
> (3) Where the Disciplinary Board does not agree with the finding or recommendation of the Disciplinary Committee, the Disciplinary Board shall make such other order as it deems just.

(4) Before the Disciplinary Board makes an order under subsection (2) or any order that is likely to be adverse against an advocate and solicitor under subsection (3), it shall notify the advocate and solicitor of its intention to do so and give him a reasonable opportunity to be heard.

[31] At the High Court, the learned High Court judge referred to the decision of *Dato' Kanagalingam a/l Veluppillai v Majlis Peguam Malaysia* [2022] 3 MLJ 699 (CA), and concluded that since the punishment meted out by the DB was not greater than the punishment recommended by the DC, therefore the appellant was not adversely affected by the decision. As such, there is no statutory requirement for the DB to give the opportunity to be heard to the appellant.

[32] Before this court, the appellant's counsel referred us to the recent Federal Court decision in *Majlis Peguam Malaysia v Syed Ahmad Imdadz bin Said Abad & Anor* [2024] 1 MLJ 527; [2024] 1 CLJ 353 . The learned High Court judge did not have the benefit of this apex court decision at the time he made his decision.

[33] The law applied by the apex court is the present provision of s 103D of the LPA because the complaint was lodged on 4 October 2016, after the present s 103D of the LPA took effect or came into force on 3 June 2014.

[34] In *Syed Ahmad Imdadz*, it was held that 'even if the DB decides to impose what it may deem to be lighter penalty or punishment that is less harsh than that recommended by the DC, the decision in our view, qualifies as being adverse, triggering the necessity for a reasonable opportunity to be heard'. The appellant's counsel urged this court to apply the same proposition of the apex court to the present case, despite the fact that the apex court's ruling was premised on the present amended s 103D of the LPA.

[35] This court is mindful of the apex court's ruling. However, the wording of the pre-amendment provision of s 103D is not the same as the present provision of s 103D of the LPA. The apex court's decision is based on the present law; whereas, in our present case, the provision that applied was the pre-amendment provision of s 103D of the LPA.

[36] We are of the view that although the wordings of the pre-amendment provision and the present provision of s 103D of the LPA are slightly different, the fact that the same words 'that is likely to be adverse against an advocate and solicitor' are used in both pre and post s 103D(4) of the LPA would connote the same interpretation. Therefore, this court could agree with the appellant's counsel that a right to be heard ought to be accorded to the appellant before the

DB meted out its decision for an adverse punishment to be imposed on the advocate and solicitor.

[37] Notwithstanding what has been said above, this court is of the considered view that the apex court's ruling that the right to be heard to the advocate and solicitor must be understood in the context as a mitigation hearing, not a re-hearing of the finding of liability.

[38] The apex court in para [30] of its judgement held that 'if the DB intends to impose any punishment, it must give the advocate and solicitor a reasonable opportunity to be heard irrespective if it is likely to be adverse or otherwise before imposing a greater or lesser punishment'.

[39] In the present case, the DB had decided for the appellant to be censured, and had rejected the DC's recommendation of a fine of RM30,000. The punishment of censure was a lesser punishment, not just lesser punishment but the least or the lowest punishment possible. Next to the lowest punishment would be no punishment, to wit, exoneration from liability. Therefore, it would make a mockery of the procedure under s 103D(4) of the LPA (pre or post amendment) if a hearing must be held for mitigation on the intended lowest punishment.

[40] In the present case, the effect of the DB's decision was a favorable one to the appellant when viewed in the context of the DC's recommendation. Therefore, whether the right to be heard was given or not, it would not make a difference because the DB's decision was favorable to the appellant, and the punishment was the lowest punishment that the appellant could have asked for. No matter how one looks at it, it could not be said the breach of natural justice (if any) in the circumstances of the peculiar facts of this case had any real impact. A mere breach of right to be heard is in itself insufficient for this court to set aside the entire decision of the DB or overturn the High Court's decision when the breach was of no significance or was not serious such as to have impact on the outcome of the DB's final decision (see the legal principle enunciated in the Federal Court decision in *Master Mulia Sdn Bhd v Sigur Rus Sdn Bhd* [2020] 12 MLJ 198; [2020] 9 CLJ 213).

CONCLUSION

[41] For the above reasons, this court dismissed the appellant's appeal and affirmed the High Court order dated 29 August 2023. This court ordered no order as to costs.

A *Appeal dismissed.*

Reported by K Selvaraju

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